

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of:

Petition for a Rulemaking to Consider
Modifications to Notice and Recordkeeping
Requirements for Use of Sound Recordings
under Statutory License

Docket No. _____

**PETITION OF SOUNDEXCHANGE, INC. FOR A RULEMAKING TO CONSIDER
MODIFICATIONS TO NOTICE AND RECORDKEEPING REQUIREMENTS
FOR USE OF SOUND RECORDINGS UNDER STATUTORY LICENSE**

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Pursuant to 5 U.S.C. § 553(e) and 17 U.S.C. §§ 112(e), 114 and 803(b)(6)(A), SoundExchange, Inc. (“SoundExchange”) hereby requests that the Copyright Royalty Judges commence a rulemaking proceeding to consider certain modifications to the notice and recordkeeping regulations for sound recordings found at 37 C.F.R. Part 370.

SoundExchange is the sole collective that has been designated by the Judges to collect and distribute sound recording royalties under the statutory licenses provided by Sections 112(e) and 114 of the Copyright Act. As such, notice and recordkeeping requirements for use of sound recordings under the statutory licenses are of critical importance to SoundExchange. Under the Section 112 and 114 terms adopted by the Judges, the data provided pursuant to the notice and recordkeeping requirements provides the basis for SoundExchange’s payments to the copyright owners and performers whose works are used by services.¹ The selection of data elements

¹ All the Section 112/114 rate regulations require SoundExchange to distribute royalties to copyright owners and performers “based upon the information provided under the reports of use requirements.” 37 C.F.R. § 380.4(g)(1); accord 37 C.F.R. §§ 380.13(i)(1), 380.23(h)(1), 382.4(d)(1), 382.13(f)(1), 384.4(g).

reported and the quality of the data therefore determine the accuracy of the distributions SoundExchange makes.

Most details of the current regulations were decided by the Copyright Office almost a decade ago, and have not subsequently been evaluated by the Office or the Judges.²

SoundExchange believes that the structure of these regulations is fundamentally sound, and that the regulations come close to striking the right balance between the need to have sufficient data to allow accurate royalty distributions and the desire to impose on services only a reasonable reporting obligation.

However, the number of services paying royalties to SoundExchange is large and growing. SoundExchange receives separate reporting, and in most cases separate payment, from more than 2,200 different services, accounting for thousands of channels and stations. With the experience of distributing more than \$1.5 billion in royalties to creators and copyright owners of sound recordings using data provided under these regulations and their predecessors, SoundExchange believes that the regulations should now be adjusted in certain respects to address important operational problems affecting the accuracy of royalty distributions and to ensure that the regulations will remain workable as the digital music market continues to mature and the scale of reporting increases.

At this time, SoundExchange proposes adjustments to the notice and recordkeeping regulations in eight areas, each of which is discussed below. SoundExchange has attached as Exhibit B specific regulatory language implementing these proposed changes. SoundExchange

² The current notice and recordkeeping regulations developed through an extended administrative process. To assist the Judges in familiarizing themselves with the history of the regulations, we have set forth in Exhibit A a detailed description of their evolution.

hereby asks the Judges to commence a rulemaking proceeding to consider these proposed changes, and in due course, to adopt them.

BACKGROUND

When Congress first enacted a sound recording performance right and made it subject to the statutory license in Section 114, it was expected that details of administration of the statutory license might be worked out in license agreements, potentially negotiated by “common agents” of copyright owners. *E.g.*, S. Rep. No. 104-128, at 27-29, 31. The Librarian of Congress was also authorized to “establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.” Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3(3) (§ 114(f)(2)), 101 Stat. 341.

It quickly became apparent that a workable statutory licensing system required collective administration of the statutory license, and SoundExchange was formed for that purpose. Services advocated for the designation of a single entity that would collect and distribute royalties even on behalf of copyright owners who did not elect to join the collective voluntarily. Notice and Recordkeeping for Digital Subscription Transmissions, 63 Fed. Reg. 34,289, 34,291-94 (June 24, 1998). In such an environment, “notice and recordkeeping” assumed critical importance, because reports of use provided by services are the only means for a collective that is not in privity of contract with either services or many of the collective’s payees to (1) know what recordings were used by services under the statutory license; (2) match that usage to repertoire known to the collective; (3) locate the proper payees for usage of repertoire not

previously known to the collective; and (4) distribute the services' royalty payments to the proper payees.

SoundExchange has developed a comprehensive process for using the information provided pursuant to the notice and recordkeeping requirements to carry out these functions. We have described that process in Exhibit C. The complexity of this process, and the resources required to execute it, have increased significantly as webcasting and other digital music markets have grown and the Judges introduced comprehensive "census" reporting for more services. For 2012, SoundExchange processed about 12,100 reports of use ("ROUs") that log performances of sound recordings, with a total of 629 million consolidated performance lines on those ROUs;³ for that same year, SoundExchange received about \$502 million in royalty payments from 2,224 services. By comparison, for 2009, SoundExchange processed about 2,300 ROUs with a total of 203 million consolidated performance lines, and it received about \$202 million in royalty payments from 1,210 services (adjusting for subsequent consolidation).

DISCUSSION

SoundExchange's experience working with the notice and recordkeeping requirements day in and day out as the digital music market has grown has convinced it that the basic structure of the notice and recordkeeping requirements is fundamentally sound. However, in order to make the process of reporting usage and distributing royalties work more efficiently and accurately as the digital music market continues to expand, SoundExchange proposes

³ Consolidated performance lines, or "CPLs," are a measure of the number of lines of data in an ROU after the data lines for the same track are consolidated.

adjustments to the notice and recordkeeping requirements in eight areas.⁴ We address each of those below.

1. ROU and Statement of Account Consolidation, Matching and Identification

To properly allocate royalty payments to their proper recipients based on actual usage, SoundExchange needs to get three things from a licensee: (1) a payment to allocate, (2) a statement of account (“SOA”) allocating the payment to a specific service and time period and reflecting the calculation of the payment (*see, e.g.*, 37 C.F.R. § 380.4(f)), and (3) an ROU detailing the usage corresponding to the payment (*see, e.g.*, 37 C.F.R. § 370.4). At present, when licensees offer multiple services (e.g., different types of service, differently-branded services, services offered by different corporate affiliates), they frequently consolidate and identify their payments and reporting in ways that make it difficult for SoundExchange to match payments, SOAs and ROUs to each other, credit payments to the proper licensee, and accurately distribute payments based on the proper usage. These practices cause significant operational issues for SoundExchange.⁵

Residential utility customers who want their payments properly credited to their accounts understand that they must enclose with their payments the bill stub identifying their account number, residence, and billing period, or that they must provide other equivalent identifying

⁴ The current notice and recordkeeping regulations have different reporting regimes for preexisting subscription services (37 C.F.R. § 370.3) and all other kinds of services (37 C.F.R. § 370.4). Because there is a closed set of only two preexisting subscription services, and SoundExchange has a long history of working with their ROUs, most of the changes proposed herein do not apply to the special notice and recordkeeping regulations for those services (37 C.F.R. § 370.3). However, the Judges may wish to consider whether distinguishing between the various types of services in this way is still justified.

⁵ SoundExchange sought to address these issues in *Webcasting III*. While SoundExchange’s proposals in this regard were not disputed in that proceeding, the Judges nonetheless declined to adopt them because the Judges concluded that the issues were “more appropriately addressed in a future rulemaking proceeding.” 76 Fed. Reg. 13,045. The issues remain important today.

information with their payments. Statutory licensees likewise should be expected to provide payments and reporting in a manner that clearly identifies the payor and scope of the activity covered. While SoundExchange can accommodate some flexibility for licensees in how they choose to identify their services and consolidate their reporting, it is important that the regulations require reporting in a way that will provide greater clarity to SoundExchange concerning what the licensee has chosen to do. In the paragraphs that follow, we describe the issues and SoundExchange's proposed solutions.

A. Consolidation and Matching

Properly allocating payments to copyright owners and performers requires associating payments and reported usage with the right licensees, and knowing when SoundExchange has all the information necessary to allocate a payment. Certain payment and reporting practices often leave unwarranted ambiguity about what payments relate to what usage. SoundExchange has proposed revisions to Section 370.4(d)(1) to address these issues.

For example, it is common among broadcast station groups to consolidate usage by affiliated stations differently for payment purposes than for reporting purposes, despite a requirement in the applicable statutory license terms requiring most broadcasters to submit a separate SOA for each of their ROUs. *See* 37 C.F.R. § 380.13(g)(1)(viii). Thus, payment might be made at the station or overall group level, while ROUs are submitted separately for regional clusters of stations. The consolidation may change from time to time, meaning that every month SoundExchange must undertake a complicated manual process of matching payments, SOAs and ROUs.

When multiple SOAs are associated with one ROU, SoundExchange does not generally receive information sufficient to break up the ROU into the component parts so that each SOA's

payment can be allocated to the right usage in the ROU. When one SOA is associated with multiple ROUs, it not only can be difficult for SoundExchange to match the ROUs to the SOA, but there is a risk that royalties will be distributed based on an incomplete set of ROUs. For example, if a broadcast station group pays (and provides SOAs) by geographic market, but provides ROUs by station, it can be difficult for SoundExchange to figure out whether or not it has all of the ROUs corresponding to a SOA. If it receives a batch of ROUs seemingly corresponding to a SOA, but is missing one ROU associated with the SOA, SoundExchange may not recognize that it should hold the payment for that market until it receives the missing ROU.

Because payments are to be allocated based on usage, SoundExchange should not be left in the position of guessing, or repeatedly contacting any of the more than 2,200 statutory licensees, to associate payments and usage. The linkage between payment and usage should be readily apparent from the documents provided by the licensee.

To achieve that result, SoundExchange proposes that the notice and recordkeeping regulations require that payments, SOAs and ROUs for affiliated entities be provided at the enterprise level if feasible. However, SoundExchange understands that some licensees may require a more flexible and granular approach. If consolidation at the enterprise level is not feasible, SoundExchange can accommodate less consolidation, but proposes that any consolidation of ROUs and SOAs for affiliated licensees be the same; that is, that there be a one-to-one relationship between usage reported in an ROU and SOA unless SoundExchange and the licensee agree otherwise.⁶ In the absence of agreement, such a rule would provide the clearest

⁶ For example, SoundExchange might be willing to agree to accept reporting where there is not a one-to-one relationship between the ROU and SOA if SoundExchange and the licensee agree to some other mechanism to make the relationship between ROUs and SOAs clear to SoundExchange.

possible linkage between payments and usage, and result in reporting that would be easy to process, and avoid mistakes and follow-up.

As noted above, the requirement of a one-to-one correspondence between ROUs and SOAs has applied to broadcasters for several years. *See* 37 C.F.R. § 380.13(g)(1)(viii). This practice has been effective and efficient for distributing the royalties of broadcasters that have complied with the rule and demonstrates the value of extending the practice to other statutory licensees. SoundExchange hopes that by including this requirement in the notice and recordkeeping regulations as well as the rate regulations, more broadcasters will comply with this requirement, and royalties for other services with similar consolidation issues can be handled similarly.

A licensee providing services in multiple rate classes (e.g., business establishment service and webcasting) necessarily must provide SoundExchange separate SOAs for services subject to different rates, because the payment calculations are different. Given that, such a licensee should, by virtue of the proposal discussed above, provide separate ROUs for each different type of service, as is commonly done today. SoundExchange has proposed adding to Section 370.4(d)(1) language making this result clear.

B. Service Name Matching

SoundExchange's associating payments with reported usage is further complicated by the fact that a single service frequently may be identified by different names on its SOAs and ROUs. For example, a licensee might identify itself by a corporate name in one and a trade name in the other, or a broadcast station group name in one and station call letters in the other. Where related licensees provide multiple SOAs and ROUs, the potential for name confusion is even greater. For example, a parent company might submit ROUs for two different services in the same name,

and SOAs for those services under two other names. In such situations, SoundExchange is forced to research the names on SOAs and ROUs to try to match them to each other.

SoundExchange proposes in Section 370.4(e)(7)(i)(A) that services be required to identify themselves on both their SOAs and ROUs by the most specific service name appropriate to the level of consolidation the licensee employs for the SOA and ROA. Where feasible, that should be the enterprise name. However, for an Internet-only webcaster, that might be the trade name/service mark under which a particular type of service is offered. For a broadcaster, it might be a station or station group, or if a station group consolidates its SOAs and ROUs geographically it might be something like [Group Name][Region Name]. For further consistency, SoundExchange proposes in Section 370.4(e)(5) that the same name be used in the ROU file name.⁷

C. Account Numbers

Simply using clear and consistent names on SOAs and ROUs would go a long way toward facilitating matching of payments, SOAs and ROUs to each other. However, if services are to have some flexibility in how they consolidate their reporting, and the ability to change consolidation from time to time (as SoundExchange is willing to give them), SoundExchange needs a mechanism to relate the name used on a particular associated SOA and ROU to the specific service offerings and relevant parent enterprise and payment history.

Like other companies that regularly receive payments from multiple sources, SoundExchange maintains accounts for payors, and internally uses numerical identifiers to

⁷ The current regulations seem to assume that the service name will be used in the file name, but do not actually say that. *See* 37 C.F.R. § 370.4(e)(5) (requiring that a file have a name, and giving an example including a service name); *see also* 70 Fed. Reg. 21,706 (“The file name should contain the name of the service submitting the file . . .”).

identify those accounts easily and unambiguously. Consumer utility bill stubs commonly identify account numbers, and utilities commonly encourage consumers to write their account numbers on their checks (as well as enclosing the bill stub with their payments) to ensure that payments are credited to the right account. To facilitate SoundExchange's matching payments to the proper accounts, SoundExchange proposes in Section 370.3(d) and 370.4(e)(7)(i)(B) that if it assigns a service (either a service provider or a specific type of service offered by a particular provider) an account/identification number, the licensee must indicate that account number on its SOA, ROU and payment for the service.

D. ROU Headers

The current regulations provide specifications for optional file headers. 37 C.F.R. § 370.4(e)(7). These headers unambiguously identify the ROU and its provider in a manner that cannot be separated from the ROU. Thus, for example, when a service has not included the reporting period in the file name as required, but uses headers, SoundExchange knows the month to which the ROU applies without needing to review the service's ROU inventory to determine which months' ROUs it has already received from that service. Headers also identify the columns in the ROU to allow SoundExchange to (1) recognize readily when a licensee has submitted an ROU with the columns out of order (a not uncommon occurrence), and (2) be able to ingest such ROUs without manual intervention. Experience with the current notice and recordkeeping regulations indicates that when services use headers in their ROUs, it significantly improves SoundExchange's ability to load ROUs without manual intervention and/or follow-up with the service.

SoundExchange proposes to require use of headers in ROUs, and to make some adjustments in the information to be included in headers. As the number of licensees continues

to grow, use of headers by all services would ensure that ROUs are clearly and permanently identified by the consistent names discussed above. It would also reduce the human effort required of both SoundExchange and/or the licensee when the licensee submits an ROU with the columns out of order. SoundExchange proposes dropping the report generation date and delimiters from the header format because they have not proven important. Instead, SoundExchange proposes adding several new lines to the header, for the reasons noted below:

- Station call letters, if multiple broadcast stations are included in a log, in order to allow SoundExchange to identify the scope of usage covered by the ROU before ingesting it.
- Audience measurement type (ATH (aggregate tuning hours) or ATP (actual total performances)), so it will be clear which type of usage is reported in the ROU.
- Checksum (total audience measurement reported on the ROU) in order to allow SoundExchange to confirm whether it received and ingested all of the data the licensee intended to provide, and thereby minimize effort and reduce the risk of inaccurate distribution if an ROU is corrupted.
- Character encoding format used in the file, in order to allow SoundExchange to read the contents of the file as the licensee intended them. (See Section 2.B below for a further discussion of character encoding formats.)
- Digital signature certifying the ROU, if the licensee chooses to include the signature in the ROU itself, in order to provide a permissible location for the signature currently required under 37 C.F.R. § 370.4(d)(4). (See Section 2.A below for a further discussion of alternative means of signature.)

When the current regulatory provisions concerning headers were under consideration, some commenters argued that providing name and contact information in the header of an ROU

would be unnecessarily burdensome because the service name is contained elsewhere in the ROU and contact information is required to be contained in a Notice of Use. *See* Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 71 Fed. Reg. 59,010, 59,012 (Oct. 6, 2006). However, it is important that licensees provide this information at the time of and integral to the ROU, because (1) information in notices of use can be out of date, (2) services may neglect to provide contact information in a cover letter or cover email as required by 37 C.F.R. § 370.4(e)(3)(ii) and (iii), and (3) it is possible for ROUs to be separated from information that is external to them. Doing so would not be unduly burdensome, because (absent a change initiated by the licensee), the header information, once initially determined and/or set up for automatic generation, could be included in a reporting template and simply replicated from month to month.

If the Judges adopt SoundExchange's proposal to make the use of headers mandatory, the current provisions of Section 370.4(e)(3)(ii) and (iii) concerning information required to be included in a cover letter or cover email accompanying an ROU would be unnecessary. These provisions are frequently overlooked by licensees. When they are observed, the relevant information is more usefully included in a header integral to the ROU than in separate correspondence. Accordingly, SoundExchange proposes deleting these requirements.

E. Direct Delivery of Notices of Use

Services that wish to rely upon the statutory licenses initially must file a Notice of Use ("NOU") in the Licensing Division of the Copyright Office. 37 C.F.R. § 370.2(d). SoundExchange proposes that services be required to send copies of their NOUs directly to SoundExchange (or any other collective that may be designated by the Judges).

The Licensing Division's only responsibility with respect to NOUs is to place them in its public records. *Id.* By contrast, SoundExchange needs to receive NOUs to carry out its mission of collecting and distributing statutory royalty payments. SoundExchange uses the information contained in NOUs to set up in SoundExchange's licensee database records of licensees and services from which it might expect payment. The discussion above all assumes that such payor records exist. Confusion and delay result when SoundExchange receives a royalty payment, SOA or ROU from a new service that cannot be associated with a payor account because SoundExchange has not yet seen the service's NOU. Thus, it is important to the orderly distribution of statutory royalty payments that SoundExchange receive NOUs promptly.

The Licensing Division is not subject to any apparent regulatory requirement to send NOUs to SoundExchange. By default, the only official process for SoundExchange to access NOUs would be by sending someone to the Copyright Office Public Records Reading Room to see if there had been filings since the last such visit. That would be very inefficient. Fortunately, the Licensing Division has kindly been sending SoundExchange copies of NOUs on approximately a monthly basis. However, even when that process works as contemplated, there is up to about a month's delay in SoundExchange receiving the NOUs it needs to be able to match and process a service's payments. And because this is only an unofficial process, deliveries of NOUs are sometimes less frequent or require a special request. This process is also subject to interruption, such as in the case of a government shutdown.

Because SoundExchange has an operational need for access to NOUs to carry out the function the Judges have entrusted to it, SoundExchange believes that the notice and recordkeeping regulations should explicitly provide a mechanism for SoundExchange to receive NOUs promptly. SoundExchange believes that the simplest such mechanism would be for

licensees to send copies of their NOUs to SoundExchange when they file them in the Copyright Office. We have proposed changes to Section 370.2(d) to include such a requirement.

SoundExchange's proposal would impose only a minimal burden on services. It would not affect services that previously filed NOUs (unless they needed to file an NOU amendment). When applicable, new services (and existing services filing NOU amendments) would only need to send a single email to SoundExchange to provide it the information it needs to process their payments.

F. Category Codes

The regulations presently require that ROUs include a "category code" indicating the type of transmission. 37 C.F.R. § 370.4(d)(2)(ii). These codes can be useful for distinguishing different types of transmissions with different royalty rates when they are combined in a single ROU, and for matching ROUs to SOAs when the matching is not otherwise apparent. However, if the Judges make the changes described above concerning consolidation of ROUs, matching ROUs to SOAs, and use of account numbers, SoundExchange believes that the concept of category codes can be dropped from the notice and recordkeeping regulations.

If the Judges do not make those changes, category codes would continue to play a useful role in royalty distribution, and the Judges should ensure that the category code list is always up to date. In 2009, the Judges updated this list somewhat, but the list does not reflect the full range of current rate categories. If category codes are retained, the list should be updated. Moreover, it can be expected that the service attributes relevant to royalty allocation may change over time. Thus, to ensure that the category codes remain synchronized with the available rate structures if the category codes are retained, the Judges should either (1) resolve regularly to adopt new codes in rate proceedings when necessary (based on the authority in 17 U.S.C. § 803(c)(3) to adopt

notice and recordkeeping requirements in rate proceedings), or (2) authorize SoundExchange to publish an updated list of codes as may be necessary to accommodate future rate structures.

2. Flexibility in Reporting Format

The Judges have previously indicated that SoundExchange and licensees have the power to vary reporting requirements by agreement. 71 Fed. Reg. at 59,012. However, SoundExchange believes it would be appropriate to confirm that in the regulations, and has proposed doing so in Section 370.3(f), 370.4(d)(1) and (e)(3), and 370.5(g). In general, SoundExchange is very willing to work with licensees to make adjustments in reporting procedures to make the statutory licenses work better for all concerned.

In addition, with more than 2,200 licensees, SoundExchange believes that certain specific points of flexibility should be addressed in the regulations themselves. SoundExchange makes these proposals in part because it hopes that licensees increasingly will elect to do business with SoundExchange electronically, such as through an online portal or electronic data feeds. SoundExchange believes that doing so would be more efficient for licensees and SoundExchange, and so thinks it appropriate to contemplate that possibility by providing more flexibility in the regulations.

A. Certification/Signature Requirements

Currently, ROUs are required to “include” a certain signed statement. 37 C.F.R. § 370.4(d)(4). This certification serves the important purpose of focusing licensees on the need to report accurate data, so SoundExchange believes the certification requirement should be retained. However, SoundExchange proposes providing more flexibility in the means of delivery of the signed certification.

For ROUs, the signature on the certification is not required to be handwritten, which is appropriate because it is to be included in an often-massive data file to be delivered in electronic form. In practice, services sometimes embed an electronic signature in their ROUs and sometimes include it in a cover email or other ancillary document. SoundExchange proposes broadening the current regulatory language to encompass current practices and other possibilities such as a click-thru acknowledgement in an online portal.

SOAs have traditionally been required to bear a handwritten signature. The handwritten signature requirement is inconsistent with efficient processing of SOAs, because SoundExchange is required to re-key or scan paper SOAs, rather than being able to ingest electronic SOAs. SoundExchange also believes that a handwritten signature requirement is quite possibly unenforceable. *See* 15 U.S.C. § 7001(a) (“with respect to any transaction in or affecting interstate or foreign commerce . . . a . . . record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form”). In any event, Congress has expressed a clear preference that the federal government embrace the use of electronic signatures, and imposed limitations on the ability of federal agencies to adopt regulations inconsistent with that preference. *See* 15 U.S.C. § 7004(b)(2).

In *Webcasting III*, SoundExchange sought to have the handwritten signature requirement dropped, so as to contemplate electronic signatures. While this proposal was not opposed, the Judges declined to adopt it, out of concern for avoiding inconsistencies in SOA signature requirements for different types of services. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 76 Fed. Reg. 13,026, 13,045 (Mar. 9, 2011). In *SDARS II*, the Judges dropped the handwritten signature requirement for SDARS. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg.

23,073, 23,075 (Apr. 17, 2013). In addition to the proposed changes to the notice and recordkeeping regulations proposed in Exhibit B, SoundExchange urges the Judges to drop the handwritten signature requirement for all SOAs at this time.⁸

B. Character Encoding

ROUs are currently required to be provided in the form of ASCII text files. 37 C.F.R. §§ 370.3(f)(1), 370.4(e)(2). SoundExchange proposes changes to both the character encoding format (discussed in this section) and file format (discussed below) to provide more options for reporting and to facilitate more accurate distributions of royalties.

The ASCII (American Standard Code for Information Interchange) character encoding format currently required by the notice and recordkeeping regulations was developed in the 1960s, and provides encoding for only 128 characters: the letters A-Z and a-z, the numbers 0-9, and some basic punctuation marks and control codes. Notably, ASCII does not support non-Latin alphabets used in many languages (*e.g.*, Korean, Chinese, Russian, Japanese), and so cannot be used accurately and consistently to report repertoire from many foreign countries. ASCII also does not support diacritical marks in the Latin alphabet, such as in the name of the artist Beyoncé.

Because ASCII is so limited, many or most computer systems have migrated to more modern character encoding formats. There are many alternatives. *See*

⁸ Thus, SoundExchange proposes striking the word “handwritten” in 37 C.F.R. § 380.4(f)(3), 380.13(f)(3), 380.23(f)(4) and 384.4(f)(3). While the handwritten signature requirement for SOAs has in each case been adopted as a term (*i.e.*, part of the decision in a rate-setting case), the Judges have authority to modify the handwritten signature requirement in this proceeding under 17 U.S.C. § 803(c)(4) (permitting modification of terms that frustrate implementation of a determination). Even if the Judges determine that they do not wish to vary such terms in this proceeding, the Judges should determine as a policy matter that they are inclined to move in that direction as they reconsider terms in future rate cases.

<http://www.iana.org/assignments/character-sets/character-sets.xml>. Licensees do not report to SoundExchange what character encoding formats they use, but it appears that SoundExchange receives ROUs in at least 5, and probably 10 or more different character encoding formats. When non-ASCII formats are used, SoundExchange is left trying to guess what character encoding was used, and risks loss of data if the wrong format is used to read the ROU when it is loaded.

SoundExchange proposes modernizing the character encoding requirements in the notice and recordkeeping regulations, in several respects:

- Recognizing the reality that services use encoding formats other than ASCII by providing flexibility for them to choose an appropriate encoding format.
- Requiring licensees to identify the character encoding format they use and include it in the ROU header, so that SoundExchange can read ROUs as they were intended, convert them properly, and not lose data.
- Requiring use of the UTF-8 encoding format if feasible. Use of the UTF-8 format is highly desirable, because it can support every system of writing. Use of UTF-8 should generally be feasible. It is probably the dominant character encoding format today, and its use has become a best practice. It is the default character encoding format in major Linux/Unix operating system implementations, which would tend to be used by larger licensees. With a trivial modification, the ROU template provided by SoundExchange and used by many smaller licensees would save the output file in UTF-8 rather than ASCII. However, if a licensee's systems do not support UTF-8, SoundExchange can accept other encoding formats if it knows what format was used.

C. XML File Format

As noted above, ROUs are currently required to be provided in text file format. 37 C.F.R. §§ 370.3(f)(1), 370.4(e)(2). SoundExchange proposes to make XML (Extensible Markup Language) a permissible (not mandatory) alternative format for delivery of ROUs. XML is a common and flexible means of encoding documents that has many advantages over text files. It would permit more flexible inclusion in ROU data files of information that now must be included in the file name or header, enable variable fields (such as SoundExchange proposes in Section 3.B for classical music), facilitate automatic validation of ROUs, allow real-time streaming of ROU data, and otherwise simplify SoundExchange's processing of ROUs. SoundExchange anticipates separately working with large licensees on voluntary migration to XML, but urges the Judges to acknowledge in the regulations that XML is a permissible reporting format.

3. Facilitating Unambiguous Identification of Recordings

In previous proceedings that considered notice and recordkeeping requirements, the most contentious issues have generally concerned the data items required to be reported on the individual lines of an ROU to identify the specific recordings used by a service. The selection of those items requires balancing the desire to minimize the burden on services with the desire and clear statutory purpose of seeing that the proper copyright owners and performers are paid when their works are performed. Such selection also should recognize that licensees often do not report accurately all of the data fields that are required. When the Office settled on the current set of data elements, it recognized that the "minimal" set of data elements adopted would permit distribution only "imperfectly." Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 69 Fed. Reg. 11,515, 11,522 (Mar. 11, 2004).

Experience since then has confirmed the Office's expectation that the current set of data elements leads to imperfect royalty allocations. A significant number of recordings cannot be identified unambiguously from the information provided by licensees under the current regulations. Experience has also made the most significant problem areas clearer:

- Compilations – Services frequently play recordings from compilation albums. When they do so, and do not report the International Standard Recording Code (“ISRC”), it is frequently impossible to determine which recording was used. The current regulations permit services to report the album and label name as an alternative to ISRC. *See* 37 C.F.R. § 370.4(d)(2)(v). However, in the case of compilation albums, those data elements frequently do not help identify the recordings used, because (1) the album title is different from the title of the original album on which the recording appeared, (2) the album title is frequently something ambiguous like “Greatest Hits,” and (3) the label distributing the compilation album is frequently different from the label distributing the original album. The problem is compounded when compilation albums involve recordings by multiple artists, and services report the artist associated with each track as “Various” (a fairly common occurrence). In such cases, the track title may be the only reported data element useful for making a match to a known recording. However, track names are often ambiguous, and in the case of compilation albums the reported marketing label often misdirects away from a match based on track name.
- Re-Records – Many artists have recorded their most popular songs multiple times, such as on an original album, a “live” album, and sometimes one or more other times with a different band, for another label or on their own. The payees are often different for each of the recordings due to different copyright owners, different “featured artists” (e.g., an

individual as solo artist and as lead member of a featured band), changing membership of a featured band over time, different producers, and different nonfeatured artists. The currently-required data elements frequently do not identify unambiguously which of several recordings of the same song was used by a service. While ISRC, if accurately supplied, has the power to identify such tracks unambiguously, observed data conflicts suggest that the ISRC is commonly misreported for re-records (*e.g.*, because the licensee has associated the ISRC of the original recording with a re-record of the same song).

- Classical – Services’ identification of classical tracks has often been just plain wrong. For example, despite the Copyright Office’s clear instructions, 69 Fed. Reg. at 11,523-24, services often report composers as artists. Even setting aside such common errors, the fact that the same popular titles have been recorded many times by many ensembles (and sometimes the same ensemble) even on a single label, means that the currently-required fields often are not sufficient to allow unambiguous identification of classical recordings.

To try to improve the proportion of usage for which payment accurately can be allocated, and reduce the amount of usage requiring laborious research to resolve unmatchable tracks, particularly in the problem areas described above, SoundExchange proposes changes in the treatment of ISRC, album title and label, and also special provisions for classical music. We describe each of these proposals below.

A. ISRC, Album Title and Label

Currently, 37 C.F.R. § 370.4(d)(2)(v) permits services other than preexisting subscription services (“PSS”) to report either the ISRC or the album title and marketing label for a recording. This is in contrast to the PSS, which are required to report all three data elements. 37 C.F.R. § 370.3(d)(5), (6), (8). Because these are alternatives for services other than PSS,

SoundExchange receives a bare minimum of information for matching even when all the required elements are reported, which is frequently insufficient in the cases described above. Moreover, services often omit or make errors in one or more of the required data elements. SoundExchange believes the change that likely would be easiest for services to implement and that would have the greatest positive effect on its match rate would be to require all services to report the ISRC where available, as well as album title and marketing label, as the PSS are required to do.

First, it must be understood that while ISRC and album/label are positioned in the current regulations as alternatives, they are by no means equally desirable alternatives. ISRC is designed to act as a unique identifier for sound recordings. When an ISRC is reported accurately, it unambiguously identifies the relevant recording in a way that no other single data element can. By contrast, use of album/label alone is especially a problem for compilations. For example, *Now That's What I Call Music!* (also known as *Now!*) is a family of different international series of compilation albums, each of which contains tracks by various artists originally released and controlled by different rights owners. These compilations have been released by one label, but the individual tracks on each album are typically owned by other record companies. When a service reports the compilation name as the album name and the compilation label as the label for the individual tracks, additional research by SoundExchange is required to identify the proper payees. Use of ISRC would unambiguously identify the tracks immediately.

ISRCs typically will be available to services. ISRCs are widely used by record companies and most digital distribution companies for purposes of rights administration, and are used for reporting purposes in direct license arrangements between record companies and webcasting and on-demand services. Larger services that receive electronic copies of recordings

from record companies and digital distribution companies should typically receive ISRCs as part of the accompanying metadata. To the extent services obtain recordings from commercial products, the ISRC generally should be encoded thereon, and when present, easily can be extracted with widely-available software tools.⁹

Accordingly, SoundExchange believes that services should be required to provide album/label in addition to ISRC where available, rather than as an alternative to ISRC. Because ISRC is conceived as a unique identifier, the principal reason for requiring album/label as well as ISRC is to allow identification of situations where services use the wrong ISRC. This seems particularly common in the case of re-records, where inconsistencies in data reported by licensees suggests that services that look up ISRCs based on artist and song title frequently associate the ISRC of an original recording with a re-record. Requiring album/label as well as ISRC also would help with unambiguous identification of compilations and classical music, and where licensees omit or provide inaccurate data for one or more required data elements.¹⁰

B. Classical Music

As described above, classical music presents special reporting problems because, compared to other genres, a high proportion of usage is of recordings of a relatively small number of songs in the standard repertoire performed by a relatively small number of ensembles and various conductors and soloists. Particularly given that services frequently identify the composer of the song as the artist, a significant portion of classical music usage cannot be

⁹ The agency in the United States for administering ISRCs provides a list of software tools that read ISRCs at http://www.usisrc.org/assets/attachment/ISRC_Encoding.pdf.

¹⁰ As noted above, reported usage that fails to match initially is researched, and much of it is eventually allocated to specific recordings through a manual process to the best of SoundExchange's ability with the available information. However, where ambiguous track identification cannot be resolved conclusively, some payees may be adversely affected.

matched unambiguously. To address these problems, SoundExchange believes the regulations should specify clearly the level of precision necessary to identify the featured artist and sound recording title of classical tracks. Specifically, SoundExchange proposes in Section 370.4(d)(2) that:

- Rather than completing the current featured artist field, a service would identify the featured artist by reporting (1) ensemble (i.e., name of orchestra or other group), (2) conductor, and (3) soloist(s), where applicable, to the extent that any of the foregoing is identified on the commercial product packaging.
- Rather than completing the current sound recording title field, a service would identify the sound recording title by reporting (1) composer, (2) title of overall work, and (3) title of movement or other constituent part of the work, if applicable.

In ASCII format reports, these would constitute six additional columns to the right of the report, which would be completed only in the case of classical tracks and to the extent applicable. In XML reports (see Section 2.C above), these additional fields could simply be added as relevant. Having the featured artist and track of classical recordings identified with this level of precision would greatly enhance SoundExchange's ability to ensure that copyright owners and performers of classical music receive the royalties to which they are entitled.

4. Reporting Non-Payable Tracks

Some licensees may not be required to make payments to SoundExchange for all the sound recordings they use in their services. For example, the commercial webcasting rate regulations base payment on "performances," and define performances to exclude performances of sound recordings that do not require a license and performances of sound recordings that are separately licensed. 37 C.F.R. § 380.2. Similarly, in the recent *SDARS II* proceeding, the Judges

determined that use of certain categories of recordings would not be compensable under the royalty structure adopted in that proceeding, 74 Fed. Reg. at 23,072-73, and thus provided for a corresponding adjustment of the payment amount owed by the service. 37 C.F.R. § 382.12(d), (e).

The new SDARS rate regulations contain specific provisions requiring identification of tracks for which a service claims a royalty exclusion. 37 C.F.R. § 382.12(h). However, no such requirement applies to other types of services. The recent SDARS proceeding revealed that even a large service can have a great deal of difficulty in accounting accurately for excluded usage, and that exclusion errors can have a significant economic effect. *E.g.*, 78 Fed. Reg. at 23,073 (“Despite the Judges’ requests, Sirius XM and its contractor, Music Reports, Inc., were incapable of providing the Judges with accurate data as to the identity and volume of directly licensed recordings on the SDARS service.”).

If a service excludes certain tracks from its calculation of royalty payments, but does not identify those tracks to SoundExchange as having been excluded (as the SDARS are now required to do under 37 C.F.R. § 382.12(h)), SoundExchange cannot know if it is being underpaid based on unwarranted exclusions. The statutory licenses operate largely on the honor system. Because the relevant information is solely in the hands of the licensee, it would be difficult or impossible for SoundExchange to discover that a service was improperly excluding tracks from its royalty payments and ROUs.¹¹

The Judges should at this time provide in the notice and recordkeeping regulations specific provisions concerning identification of recordings that licensees use without paying

¹¹ Unwarranted exclusions could potentially be discovered in an audit, but only incompletely and much later. Moreover, as described in Section 7, failure of services to retain source records may limit SoundExchange’s ability to discover unwarranted exclusions even in an audit.

statutory royalties. Specifically, SoundExchange proposes in Section 370.4(d)(2) requiring that ROUs for a service relying on the statutory licenses include reporting of all recordings used by the service, with a new field flagging any usage excluded from the service's royalty payment.¹² Services that do not obtain direct licenses or do not otherwise exclude any usage from their royalty calculation would not need to change their reporting practices as a result of this proposal. This proposal would in effect apply 37 C.F.R. § 382.12(h) to other types of services that take royalty exclusions for certain usage. For the same reasons that the Judges adopted such a rule for the SDARS, they should make a similar provision for other types of services making royalty exclusions.

5. ROUs That Are Late or Never Delivered at All

While many licensees submit ROUs on a timely basis, a disturbingly large number of licensees do not. For 2012, 69% of licensees paying royalties and required to deliver ROUs have not delivered at least one ROU that they were required to deliver. Worse still, 31% of such licensees have not delivered *any* ROUs at all. In addition, 41% of the ROUs that SoundExchange has received for 2012 were received more than five days late.

ROUs that are so out of compliance as to be unusable are likewise a problem. For 2012, 585 licensees delivered ROUs with an average match rate under 50%. While some incidence of non-matching is to be expected due to causes such as ambiguity or new repertoire, such a low match rate is a clear red flag. Inspection of ROUs provided by some licenses with match rates

¹² Listing such tracks without flagging them as excluded from the royalty calculation would necessarily result in SoundExchange allocating payments to the copyright owners and performers of recordings for which the service did *not* intend to pay statutory royalties, to the detriment of copyright owners and performers of recordings for which the service *did* intend to pay royalties.

significantly below average indicates that the reports provided by such licensees have a high incidence of missing data elements.

These poor reporting practices have a clear and direct effect on payments to copyright owners and performers. SoundExchange cannot process a payment when it does not have a useable ROU. Thus, non-submission and delayed submission of ROUs, and submission of ROUs that are significantly noncompliant, mean that copyright owners and performers cannot receive the royalties to which they are entitled. SoundExchange makes three specific proposals directed to these problems, which are described in the paragraphs that follow.

A. Proxy Distribution

The poor reporting practices described above have a long history. To address these problems, SoundExchange has twice previously been authorized to use proxy data¹³ to distribute royalties for which ROUs were not provided. The first of these was in 2004, when the Office authorized SoundExchange to use data reported by the PSS to distribute royalties for other types of services for the period from 1998 through 2004. *See* Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 69 Fed. Reg. 58,261 (Sept. 30, 2004); *see also* 37 C.F.R. § 270.4(b). This was necessitated by the failure of most webcasters to keep records of their usage over the period before the Office’s adoption of specific reporting requirements, despite the Office’s admonition to do so.

The second was in 2011, when the Judges authorized SoundExchange to use proxy data to distribute statutory royalties that were paid for the 2004-2009 period by licensees that had not provided ROUs. SoundExchange proposed a proxy distribution at that time because it had

¹³ “Proxy data” is data about usage, other than the actual usage for which the relevant royalties were paid, which is used in place of (*i.e.*, as a “proxy” for) data concerning the actual relevant usage in making a royalty distribution.

reached a point where it believed that the likelihood of obtaining a meaningful amount of further data was small, and it was not in the interest of copyright owners or performers to continue to pursue missing reports of use. In the end, SoundExchange used the proxy approved in 2011 to distribute about \$21.5 million (representing about 3.4% of royalties over the relevant period) that it could not distribute due to missing ROUs (including ROUs so noncompliant as to be unusable).

At this time, SoundExchange has about \$13.1 million in royalties for the 2010-2012 period that are undistributable due to missing or unusable ROUs (about 1.2% of total royalties for that period). While SoundExchange wishes that it could obtain the data necessary to distribute this money to the proper payees, it is again reaching a point of diminishing returns, where it cannot justify further expenditure of money that belongs to copyright owners and performers to try to press licensees to provide missing ROUs. While it is unfortunate, it likewise seems inevitable that this situation will arise in the future. Accordingly, in Section 370.6(b) of the proposed regulations attached as Exhibit B, SoundExchange asks the Judges to grant it standing authorization to make such proxy distributions when its board determines that it has done what is practicable to try to secure missing ROUs from a service and further efforts to seek missing ROUs are not warranted.

The provisions adopted by the Judges in 2011 to authorize the 2004-2009 distribution (Sections 370.3(i) and 370.4(f)) specify methodological details suggested and used by SoundExchange for that distribution. In Exhibit B, SoundExchange has proposed generalizing this language. While SoundExchange does not necessarily contemplate changes to the proxy distribution methodology it used for the 2004-2009 distribution, SoundExchange believes that a standing regulation (as opposed to one targeted at a one-time distribution and based on an

analysis of the situation at that time) should provide flexibility for SoundExchange to reassess the details of the distribution methodology from time to time to achieve fair results based on circumstances at that time and its most recent data and experience.

SoundExchange's board of directors includes a balanced representation of all parts of the recording industry, including major and independent labels, recording artists, artist representatives and music organizations. As such, it is broadly representative of the constituencies affected by the decision to make a proxy distribution or continue the pursuit of missing ROUs, and well-situated to make a determination of when a proxy distribution is justified and of what precise methodology should be employed.

B. Late Fees

As described above, delinquent submission of ROUs is a significant problem that delays distribution of millions of dollars of statutory royalties each year. While SoundExchange believes that its proxy distribution proposal discussed above is necessary (because there will always be some amount of usage for which an ROU will never be provided), SoundExchange is worried that this problem will get even worse if the proxy distribution proposal is adopted, because licensees will know that, if they do not provide ROUs, their payments eventually will be distributed. To provide an incentive for compliance, SoundExchange proposes that the Judges adopt in Section 370.6(a) of the proposed regulations attached as Exhibit B a late fee for late ROUs (including ROUs that are late because SoundExchange rejected earlier versions of them due to noncompliance).

The Judges have adopted late fees for every Section 112/114 rate class, and applied late fees not only to late payments but also to late submission of SOAs. *See* 37 C.F.R. §§ 380.4(e),

380.13(e), 380.23(e), 382.3(d), 382.13(d).¹⁴ As a result of settlements, the late fee terms for broadcasters also apply to late submission of ROUs. 37 C.F.R. §§ 380.13(e), 380.23(e). The Judges should adopt a notice and recordkeeping regulation providing a late fee for late ROUs for all types of services.¹⁵ The same considerations that warrant imposition of a late fee for late SOAs also apply to late ROUs. Specifically, SoundExchange cannot distribute a royalty payment to the copyright owners and performers who are entitled to it until it has the payment, an SOA and an ROU. Two out of three is not enough. Experience with adoption of the late fee for SOAs indicates that late fees are effective at promoting compliance. Given many licensees' poor record of ROU submission, the Judges should at this time adopt a late fee for late ROUs.

C. Accelerating Delivery of ROUs

Finally, ROUs are currently due 45 days after the close of the relevant reporting period. 37 C.F.R. § 370.4(c). That is the same time as statutory royalty payments are generally due, but it is a relatively long reporting period. Most businesses operate on a 30-day accounting cycle, and SoundExchange understands that reporting on a 30-day cycle for digital music services is common under commercial music license agreements. While a 45-day cycle might have been appropriate in the past when non-PSS services provided ROUs only on a quarterly basis, in an environment of monthly reporting for all services except "minimum fee broadcasters," it is unusual to provide more time to report for an accounting period than the length of the accounting period being reported on.

¹⁴ The current terms for business establishment services provide a late fee for payments only, 37 C.F.R. § 384.4(e), but the late fee is to be extended to SOAs for the next rate period. *See* Determination of Rates and Terms for Business Establishment Services, Docket No. 2012-1 CRB Business Establishments II (Sept. 18, 2013).

¹⁵ The Judges have indicated that such a proposal properly can be considered a notice and recordkeeping issue. 76 Fed. Reg. 13,045 & n.39.

SoundExchange is always looking for ways to speed the flow of royalties to copyright owners and performers, and processing of ROUs is a significant source of delay in the payment pipeline, particularly when a licensee must be asked to correct a badly defective ROU. To expedite the allocation of royalties and/or to allow more time for data quality assurance without affecting the timing of distributions, SoundExchange proposes moving the due date for ROUs for non-PSS services up by 15 days, making it 30 days following the end of the relevant reporting period.

6. Correction of ROUs and SOAs

SoundExchange believes that it would be helpful to provide clear guidance concerning the correction of ROUs and SOAs by licensees, and has included a proposal to that effect in Section 370.7 of the attached proposed regulations.

Independent of SoundExchange's efforts to secure delivery of compliant ROUs in the first instance, SoundExchange occasionally receives from services at their own initiative corrected ROUs and particularly corrected SOAs once it has already processed ROUs and SOAs for the relevant period. (Correction of SOAs is particularly common when services paying on a percent of revenue basis adjust their revenue for a period.) Sometimes a correction can affect multiple months of activity, and the reporting for a particular month can be corrected multiple times. Once SoundExchange has allocated the payment on a SOA to usage on an ROU, such corrections are very disruptive to the flow of royalties through SoundExchange. Adjustments are typically relatively small, but processing even a small adjustment requires significant human and system resources. Adjustments that would result in smaller allocations to any particular recording, especially long after the fact, are especially a problem. Once the money is distributed

to copyright owners and performers, a debit to their account may take a long time to recover, or may never be recovered.¹⁶

To provide licensees a fair opportunity to correct their own errors without unreasonably burdening the royalty distribution process, SoundExchange proposes that (1) licensees be barred from claiming credit for a downward adjustment in royalty allocations after the date that is 90 days after submission of the original ROU or SOA, and (2) SoundExchange be permitted to allocate any adjustment to the usage reported on the service's next ROU, rather than the ROU for the period being adjusted.

7. Recordkeeping

The recordkeeping part of notice and recordkeeping has always received less attention than the notice part.¹⁷ Currently, what is required in the way of recordkeeping for usage is that licensees retain copies of their ROUs for three years. 37 C.F.R. §§ 370.3(h), 370.4(d)(6). That is a useful requirement to address a case in which an ROU is lost in transmission to SoundExchange, but that is the only issue it addresses.

All of the various rate regulations have audit provisions. 37 C.F.R. §§ 380.6, 380.15, 380.25, 382.6, 382.15, 384.6. They also generally have record retention requirements for records

¹⁶ For example, consider an artist overpaid on a hit recording at the peak of its popularity. As an accounting matter, it is possible to correct the overpayment by debiting the artist's account by the amount of the overpayment, leaving a negative account balance. However, there is no mechanism for SoundExchange to get a refund from an artist to pay off the negative account balance. As a practical matter, the negative account balance must be paid off by future usage of the artist's recordings. If the correction is made after interest in the recording has declined, SoundExchange may have to carry the negative account balance for a long time before future use of the artist's works makes up the deficit.

¹⁷ ROUs serve the statutory purpose of providing notice of use. *See* 63 Fed. Reg. at 34,296 (report of use regulations "prescribe[] rules under which Services shall serve copyright owners with notice of use of their sound recordings").

“relating to payments.” 37 C.F.R. §§ 380.4(h), 380.13(j), 382.4(e), 382.13(g), 384.4(i).¹⁸ In *Webcasting III*, the Judges indicated that this language does not require retention of server logs. 76 Fed. Reg. 13,044.

When a service’s royalty payments potentially depend on its usage of sound recordings, this result leaves a large gap in the statutory license system, because there is no clear mechanism to allow SoundExchange to substantiate a service’s royalty payments that depend on the usage asserted on the service’s ROUs and SOAs. It is important to recognize that the statutory licenses mostly operate on the honor system, except for occasional audits of services by SoundExchange. SoundExchange’s experience auditing services indicates considerable variation in licensees’ practices concerning retention of records relating to usage.

When the only records of use retained by a licensee are copies of ROUs, the audit right does little to ensure that copyright owners and performers receive the royalties to which they are entitled. ROUs are prepared specifically for delivery to SoundExchange, and SoundExchange should already have them by the time of an audit. The question one would hope to answer through an audit is whether the ROUs and associated SOAs are accurate, or whether the service has understated the usage on which it should be paying royalties. In fact, when SoundExchange’s auditors have been able to access services’ records of use underlying their ROUs and SOAs, SoundExchange frequently has found underpayment. Just by way of example, SoundExchange has found services that have adopted business rules systematically to exclude from their reported usage performances of less than a certain length, even though the rate regulations permit no such exclusion. One cannot find such an unauthorized exclusion by

¹⁸ The terms for educational broadcasters have more detailed record retention requirements specifically requiring retention of server logs. 37 C.F.R. § 380.23(i).

looking only at ROUs that are missing the excluded data. One discovers such an unauthorized exclusion by comparing the usage reported on the ROUs to the original records from which the ROUs were generated.

To ensure that copyright owners and performers receive the payments to which they are entitled, SoundExchange proposes in Section 370.4(d)(5) that services be required to retain and provide access to unsummarized source records of usage in electronic form, such as server logs or other native data, rather than simply the ROUs that are supposed to be derived therefrom. Where a licensee relies upon a third-party contractor for its transmissions, SoundExchange proposes that the licensee retain server logs or native records of usage if practicable, or otherwise the native data provided by the contractor to the licensee.

8. Housekeeping

Finally, SoundExchange proposes a series of housekeeping changes in the regulations.

A. Quattro Pro Template

The regulations currently require that SoundExchange provide template ROUs in Quattro Pro format, as well as Microsoft Office format. 37 C.F.R. § 370.4(e)(2). SoundExchange proposes deleting that requirement. Quattro Pro's successor product (WordPerfect Office) is compatible with Microsoft Excel, so any licensee that wishes to compile ROUs with spreadsheet software, and uses only WordPerfect Office rather than Excel, is able to use SoundExchange's Excel format template.

B. Inspection of Reports of Use

Section 370.5(d) permits copyright owners to inspect ROUs. This provision reflects an outdated view of how collective administration of the statutory licenses would work. SoundExchange proposes updating it at this time.

Section 370.5(d) has its roots in the first Section 114 notice and recordkeeping regulations. 63 Fed. Reg. at 34,297. At that time, Section 114 did not contemplate a collective such as SoundExchange or direct payments to artists. Instead, the statutory language assumed that copyright owners would receive Section 114 royalty payments, and they were required to “allocate to recording artists” their 50% share. Pub. L. No. 104-39, 109 Stat. 336, § 3 (1995) (amending Section 114 to add subsection (g)(2)). The Office was initially skeptical that it had authority to recognize a single collective, rather than requiring that ROUs be sent by services to all relevant copyright owners, and a significant issue in the initial notice and recordkeeping proceeding was how a collective would provide copyright owners access to ROUs. The Office ultimately adopted the predecessor of Section 370.5 to address that issue. The Office envisioned the collective as a “central repository” for ROUs, and seems to have expected that the collective’s making ROUs available at its office would play a significant role in the administration of Section 114. *See* 63 Fed. Reg. at 34,293-94; 37 C.F.R. § 370.5(d). There was no need to provide performers direct access to ROUs at that time, because the statute contemplated that they would be accounted to and paid by their record companies.

The Office probably did not expect that the collective – now SoundExchange – would receive approximately a thousand ROUs a month, with the largest of them having on the order of a million consolidated performance lines (corresponding to about 30,000 single-spaced pages in landscape format), or that it would maintain accounts for some 24,000 copyright owners. In such an environment, inspecting ROUs at SoundExchange’s office is not a realistic way for copyright owners to be informed of use of their recordings. Copyright owners and artists receive notice of the use of their recordings from the royalty statements SoundExchange generates for them. Inspection of ROUs as described in Section 370.5(d) instead provides a means for copyright

owners to, in effect, audit SoundExchange. Copyright owners occasionally invoke it to spot-check that usage of their works reported by services is properly flowing through SoundExchange's royalty distribution system.

SoundExchange now proposes two updates to Section 370.5(d). First, in 2002, the Small Webcaster Settlement Act, Pub. L. No. 107-321, 116 Stat. 2780 § 5(c) (2002), amended Section 114(g)(2) to recognize collective administration of the statutory license and provide for direct payments to artists by SoundExchange. Section 370.5(d) was never amended to reflect that change. Because artists are entitled to direct payments from SoundExchange, SoundExchange believes that the notice and recordkeeping regulations should recognize that featured artists have the same right to inspect ROUs as record companies.

Second, the last sentence of Section 370.5(d) contemplates specific efforts by SoundExchange to make reports of use available to copyright owners. Making raw ROUs available to copyright owners in the ordinary course does not make sense given the volume of data involved, particularly if the means of access is inspection at SoundExchange's office. SoundExchange's royalty statements are designed to provide copyright owners and performers information derived from ROUs that is relevant to them without inundating them with information that is not relevant to them. Accordingly, SoundExchange proposes deleting the last sentence of Section 370.5(d).

C. Redundant Confidentiality Provisions

The notice and recordkeeping regulations have three separate confidentiality provisions. One of them (37 C.F.R. § 370.5(e)) applies to ROUs generally. The same provision is repeated in the PSS regulations (37 C.F.R. § 370.3(g)) where it serves no purpose in light of 37 C.F.R. § 370.5(e). A similar (but not identical) provision is contained in the regulations for services

other than PSS (37 C.F.R. § 370.4(d)(5)). SoundExchange proposes eliminating the redundant provisions in Sections 370.3(g) and 370.4(d)(5).

D. Clarification of New Subscription Services

The regulations provide that SDARS, new subscription services, business establishment services and minimum fee broadcasters can report usage based on aggregate tuning hours rather than actual total performances. 37 C.F.R. § 370.4(d)(2)(vii). In the proceeding in which the Judges adopted the relevant language, they expressed their intention that services paying royalties on a per-performance basis would report performances, while services with “technological impediments to measuring actual listenership” would retain the aggregate tuning hour option. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 73 Fed. Reg. 79,727, 79,729 (Dec. 30, 2008).

With this expressed intention, it appears that the reference to *new subscription services* is broader than the Judges intended. A new subscription service is simply a subscription service that is not a PSS or SDARS. 17 U.S.C. § 114(j)(8). There are today two principal types of new subscription services with different technology platforms, business models and applicable rate structures. One set of new subscription services provides a PSS-like service through cable and satellite television distributors and pays royalties pursuant to 37 C.F.R. Part 383 on a percentage of revenue basis. Another set of new subscription services provides subscription webcasting and pays royalties pursuant to 37 C.F.R. Part 380 Subpart A on a per-performance basis. When the Judges provided for reporting of usage by new subscription services on an aggregate tuning hour basis, it is clear that the Judges intended to address the former and not the latter, because the former are situated similarly to other services with the aggregate tuning hour option as to royalty payment basis and technology, and the latter are not. SoundExchange proposes clarifying that

result in 37 C.F.R. § 370.4(d)(2)(vii) and the definition of aggregate tuning hours in 37 C.F.R. § 370.4(b)(1).

E. Definition of Aggregate Tuning Hours

The term aggregate tuning hour is defined in Section 370.4(b)(1). That term is currently used only in Section 370.4(d)(2)(vii) (the provision discussed above permitting certain types of services to report usage on an aggregate tuning hour basis).¹⁹ The definition in Section 370.4(b)(1) identifies specific types of services to which it applies, but that list was not updated to reflect the list of services that the Judges incorporated in Section 370.4(d)(2)(vii) in 2009 (as discussed above). *See* Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 74 Fed. Reg. 52,418 (Oct. 13, 2009). SoundExchange proposes conforming the listing of services in the definition to the listing of services entitled to report on an aggregate tuning hour basis.

F. SoundExchange Address

SoundExchange has moved offices, so the address given for it in 37 C.F.R. § 370.4(e)(4) is no longer correct. To avoid this problem in the future, SoundExchange proposes substituting a more generic reference, as in the notice and recordkeeping regulations for PSS (37 C.F.R. § 370.3(b)) and the various rate regulations (*e.g.*, 37 C.F.R. § 380.4(a)).

G. Timing of SoundExchange Annual Report

The notice and recordkeeping regulations require SoundExchange to file an annual report. 37 C.F.R. § 370.5(c). The regulations do not specify a deadline for doing so. However, in a discovery order in a rate proceeding, the Judges expressed a preference that “annual reports

¹⁹ SoundExchange proposes renumbering that provision as Section 370.4(d)(2)(viii)(A), and adding a further reference in Section 370.4(e)(7)(i)(M).

should be posted no later than the end of the first quarter of the year following the year that is the subject of the report.” Order Granting in Part and Denying in Part Services’ Motion to Compel SoundExchange to Provide Discovery Relating to the Testimony of Barrie Kessler, Docket No. 2005-5 CRB DTNSRA, at 3 (June 6, 2007).

Providing annual reports by March 31 has required SoundExchange to base its annual reports on incomplete and unaudited numbers. Services are not currently required to account for their December usage until mid-February, and year-end payments and accountings frequently are received by SoundExchange after that. As a result, SoundExchange cannot close its books on a year’s collections and distributions until March; its auditors typically examine its books in May; and SoundExchange’s audit typically is not complete until about the end of June. SoundExchange believes that the purpose of the annual report provision would be better served by allowing it to base its annual report on its audited numbers. It would like to have enough time after the completion of its audit to prepare a typical corporate annual report incorporating the audited numbers. Accordingly, SoundExchange proposes specifying in regulations that its annual report should be posted by September 30.

H. Capitalization of Defined Terms

The current regulations capitalize defined terms in some places and do not capitalize them in others. Sound Exchange has no particular preference which convention is adopted, but believes that a consistent convention should be employed throughout the regulations. For purposes of Exhibit B, SoundExchange has capitalized defined terms. In some places, SoundExchange has also proposed eliminating capitalization of some terms that are not defined in these regulations.

I. Obsolete Definition

The defined term AM/FM Webcast in 37 C.F.R. § 370.4(b)(2) does not appear to be used in the current regulations, so SoundExchange proposes deleting the definition.

J. References to Statutory Licenses

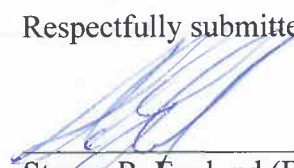
SoundExchange proposes referring to the statutory licenses consistently as Section 114 and Section 112(e), unless a more specific reference is indicated by the circumstances.

CONCLUSION

For the reasons set forth above, SoundExchange respectfully requests that the Judges promptly commence a rulemaking proceeding to consider the proposed regulatory changes set forth in Exhibit B and described above.

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Respectfully submitted,



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Exhibit A
History of Section 112/114 Notice and Recordkeeping Requirements

Because the current Judges have not had occasion to address the Section 114 notice and recordkeeping requirements, we thought it would be helpful to provide a description of how the current regulations came to be. We describe that administrative process below.

The Section 114 license was originally enacted in 1995. At that time, the only services in operation and eligible to rely on it were the services now known as the “preexisting subscription services” or “PSS.” *See* 17 U.S.C. § 114(j)(11). The Copyright Office established initial notice and recordkeeping requirements for the PSS in 1998. 63 Fed. Reg. at 34,289. These regulations required services to provide ROUs including “intended playlists” listing various data elements for “every recording scheduled to be transmitted.” *Id.* at 34,296.

In 1998, Congress amended Section 114 to expand the statutory license to webcasting (and enacted Section 112(e)). When that happened, the Copyright Office initially assumed that the then-existing notice and recordkeeping regulations would apply to all types of services, and provided a period of time for then-existing nonsubscription services to file initial notices of use to bring themselves within the statutory license system. Notice and Recordkeeping for Nonsubscription Digital Transmissions, 64 Fed. Reg. 50,758 (Sept. 20, 1999).

However, it quickly became clear that determining what data would need to be provided in reports of use submitted by the larger and more diverse webcasting community would prove more complicated than for the PSS. In 2002, the Copyright Office began a process of revisiting the regulations that had been developed for the PSS. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (Feb. 7, 2002). After initial comments and a public meeting, the Office announced transitional requirements for prospective reporting, while continuing to work on complete regulations. It cautioned webcasters to retain

records of past use for retrospective reporting. Notice and Recordkeeping for Use of Sound Recordings Under Statutory Licenses, 67 Fed. Reg. 59,573, 59,574-75 (Sept. 23, 2002). The SDARS commenced providing their services at about the same time.

In 2004, the Office adopted regulations concerning the information that webcasters and all other types of services except PSS would be required to retain and include in reports of use. 69 Fed. Reg. at 11,515. Because webcasters had little experience keeping records of use and “imposition of extensive and detailed reporting requirements at this time could increase the instances of noncompliance,” the Office chose to “require a minimal level of reporting at this time.” *Id.* at 11,522. In particular, the Office declined to require reporting of many data elements SoundExchange viewed as important, and chose to require reporting for only two weeks per quarter. However, it announced that in the future, “year-round census reporting is likely to be the standard.” *Id.* at 11,522-26. The Office deferred the question of the format and means of delivery of reports of use. *Id.* at 11,516.

Returning to the issue of retrospective reporting, the Office found that non-PSS services had kept few records of their prior activities. In the absence of better options, the Office authorized SoundExchange to use data reported by the PSS to distribute royalties for other types of services for the period from October 29, 1998 through March 31, 2004 (a “proxy” for reports of actual usage). 69 Fed. Reg. at 58,261. That action permitted SoundExchange to distribute royalties for the 1998-2004 period that it had been holding pending resolution of notice and recordkeeping issues.

The notice and recordkeeping regulations adopted in 2004 left the PSS subject to the regulations that had been adopted in 1998. The Office had initially sought to have uniform notice and recordkeeping requirements for all kinds of services. However, SoundExchange (then

a division of the RIAA) and the PSS were content to operate under substantially the existing framework. 69 Fed. Reg. at 11,517-18. SoundExchange and the PSS proposed a handful of revisions to the 1998 regulations, which the Office adopted in 2005. Reports of Use of Sound Recordings Under Statutory License, 70 Fed. Reg. 24,309 (May 9, 2005).

In 2005, the Office also published a notice of proposed rulemaking to address the last of the issues left open in the 2004 regulations – the format and means of delivery of reports of use for non-PSS services. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 70 Fed. Reg. 21,704 (Apr. 27, 2005).

A few weeks later, the Copyright Royalty and Distribution Reform Act (“CRDRA”) went into effect. Pub. L. No. 108-419, § 6(a), 118 Stat. 2369 (2004). The CRDRA created the position of Copyright Royalty Judge and transferred to the Judges the power to set notice and recordkeeping requirements under Section 112(e) and 114 (as well as the power to set rates under those sections). 17 U.S.C. § 112(e)(4), 114(f)(4)(A).

The first rate proceeding to come before the Judges was the one now commonly referred to as *Webcasting II*. When direct statements were submitted in that case, on October 31, 2005, it was not clear to the participants in the proceeding whether notice and recordkeeping issues would be addressed in that proceeding or in a rulemaking, so the participants in that proceeding submitted testimony concerning certain notice and recordkeeping issues. The Judges determined to address the issues through notice and comment rulemaking instead. Digital Performance Right in Sound Recordings and Ephemeral Recordings, 72 Fed. Reg. 24,084, 24,109-10 (May 1, 2007).

In 2006, the Judges completed their rulemaking to adopt notice and recordkeeping regulations for non-PSS services. The Judges resolved the format and delivery issues that had

been left open by the Office, based on comments submitted in response to the Office's notice of proposed rulemaking. In other respects, the Judges incorporated in 37 C.F.R. Part 370 the notice and recordkeeping regulations that previously had been adopted by the Office. 71 Fed. Reg. at 59,010. That action permitted ordinary-course delivery of reports of use to commence for all types of services.

In 2009, the Judges revisited the subject of sound recording notice and recordkeeping. The major focus of the Judges' inquiry was the two-weeks-per-quarter sample reporting that had been adopted by the Office on an interim basis in 2004. The Judges ultimately determined that "census" reporting (i.e., reporting of all sound recordings used by a service) should be required for all services except certain broadcasters paying only the minimum statutory royalty. 37 C.F.R. § 370.4(b)(3), (d)(3). The Judges also narrowed the range of services permitted to report usage on the basis of aggregate tuning hours rather than actual total performances, and made a few minor changes in the regulations, including relocating definitions and deleting obsolete provisions. The Judges declined to address various other proposals, including SoundExchange proposals for late fees for reports of use and distribution of statutory royalties based on proxy data when services do not provide required reports of use. 74 Fed. Reg. at 52,422. The Judges indicated that some of these proposals "may merit further examination in a future rulemaking." *Id.* at 52,423.

In the *Webcasting III* rate proceeding, SoundExchange proposed a couple of "terms" relating to notice and recordkeeping issues: requirements for identification of licensees in statements of account and reports of use, and a late fee for reports of use. The Judges determined that these issues would more appropriately be addressed in a rulemaking proceeding. 76 Fed. Reg. at 13,045-46.

In 2011, SoundExchange petitioned the Judges to authorize it to use proxy data to distribute statutory royalties for the 2004-2009 period paid by services that had not provided reports of use. Specifically, SoundExchange proposed to use usage reported by other services of the same type for the same year to distribute this last few percent of otherwise undistributable royalties. The Judges adopted SoundExchange's proposal, which resulted in the current form of the regulations. Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 76 Fed. Reg. 45,695 (Aug. 1, 2011); 37 C.F.R. §§ 370.3(i), 370.4(f).

Exhibit B
Proposed Regulations

PART 370—NOTICE AND RECORDKEEPING REQUIREMENTS FOR STATUTORY LICENSES

Sec.

370.1 General definitions.

370.2 Notice of use of sound recordings under statutory license.

370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

370.6 Late reports of use.

370.7 Correction of reports of use and statements of account.

Authority: 17 U.S.C. 112(e)(4), 114(f)(4)(A).

§ 370.1 General definitions.

For purposes of this part, the following definitions apply:

(a) A *Notice of Use of Sound Recordings Under Statutory License* is a written notice to sound recording copyright owners of the use of their works under section 112(e) or 114(d)(2) of title 17, United States Code, or both, and is required under this part to be filed by a Service in the Copyright Office.

(b) A *Service* is an entity engaged in either the digital transmission of sound recordings pursuant to section 114(d)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code or both. The definition of a Service includes an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2). ~~114.~~ A Service may be further characterized as either a ~~preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service, business establishment service~~ Preexisting Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service, Business Establishment Service or a combination of those.

(c) A *Preexisting Subscription Service* is defined in 17 U.S.C. 114(j)(11).

(d) A *New Subscription Service* is defined in 17 U.S.C. 114(j)(8).

(e) A *Nonsubscription Transmission Service* is a ~~service~~Service that makes noninteractive nonsubscription digital audio transmissions that are not exempt under section 114(d)(1) of title 17 of the United States Code and are made as part of a ~~service~~Service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including transmissions of broadcast transmissions, if the primary purpose of the ~~service~~Service is to provide to the public such audio or other entertainment programming, and the primary purpose of the ~~service~~Service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

(f) A *Preexisting Satellite Digital Audio Radio Service* is defined in 17 U.S.C. 114(j)(10).

(g) A *Business Establishment Service* is a ~~service~~Service that makes ephemeral phonorecords of sound recordings pursuant to section 112(e) of title 17 of the United States Code and is exempt under section 114(d)(1)(C)(iv) of title 17 of the United States Code.

(h) A *Collective* is a collection and distribution organization that is designated under one or both of the statutory licenses by determination of the Copyright Royalty Judges.

(i) A *Report of Use* is a report required to be provided by a Service that is transmitting sound recordings pursuant to the statutory license set forth in section 114(~~d~~)(2) of title 17 of the United States Code or making ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code, or both.

§ 370.2 Notice of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which copyright owners shall receive notice of use of their sound recordings when used under either section 112(e) or 114(~~d~~)(2) of title 17, United States Code, or both.

(b) *Forms and content.* A Notice of Use of Sound Recordings Under Statutory License shall be prepared on a form that may be obtained from the Copyright Office Web site or from the Licensing Division, and shall include the following information:

(1) The full legal name of the Service that is either commencing digital transmissions of sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both.

(2) The full address, including a specific number and street name or rural route, of the place of business of the Service. A post office box or similar designation will not be sufficient except where it is the only address that can be used in that geographic location.

(3) The telephone number and facsimile number of the Service.

(4) Information on how to gain access to the online Web site or homepage of the Service, or where information may be posted under this section concerning the use of sound recordings under statutory license.

(5) Identification of each license under which the Service intends to operate, including identification of each of the following categories under which the Service will be making digital transmissions of sound recordings: ~~Preexisting subscription service, preexisting satellite digital audio radio service, nonsubscription transmission service, new subscription service or business establishment service~~ Subscription Service, Preexisting Satellite Digital Audio Radio Service, Nonsubscription Transmission Service, New Subscription Service or Business Establishment Service.

(6) The date or expected date of the initial digital transmission of a sound recording to be made under the section 114 statutory license and/or the date or the expected date of the initial use of the section 112(e) license for the purpose of making ephemeral phonorecords of the sound recordings.

(7) Identification of any amendments required by paragraph (e) of this section.

(c) *Signature.* The Notice shall include the signature of the appropriate officer or representative of the Service that is either transmitting the sound recordings or making ephemeral phonorecords of sound recordings under statutory license or doing both. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Notice and by the date of the signature.

(d) *Filing notices; fees.* The original and three copies shall be filed with the Licensing Division of the Copyright Office and shall be accompanied by the filing fee set forth in § 201.3(e) of this title. Notices shall be placed in the public records of the Licensing Division. The Notice and filing fee shall be sent to the Licensing Division at either the address listed on the form obtained from the Copyright Office or to: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557-6400. A copy of each Notice also shall be sent to each Collective designated by determination of the Copyright Royalty Judges, at the physical or electronic mail address posted on the Collective's website or identified in its Notice of Designation as Collective under statutory license pursuant to § 370.5(b). A Service that, on or after July 1, 2004, shall make digital transmissions and/or ephemeral phonorecords of sound recordings under statutory license shall file a Notice of Use of Sound Recordings ~~under~~ Under Statutory License with the Licensing Division of the Copyright Office and send a copy of the Notice to each Collective prior to the making of the first ephemeral phonorecord of the sound recording and prior to the first digital transmission of the sound recording.

(e) *Amendment.* A Service shall file a new Notice of Use of Sound Recordings ~~under~~ Under Statutory License within 45 days after any of the information contained in the Notice on file has changed, and shall indicate in the space provided by the Copyright Office that the Notice is an amended filing. The Licensing Division shall retain copies of all prior Notices filed by the Service.

§ 370.3 Reports of use of sound recordings under statutory license for preexisting subscription services.

(a) *General.* This section prescribes the rules for the maintenance and delivery of ~~reports~~Reports of ~~use~~Use for sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by ~~preexisting subscription services~~Preexisting Subscription Services.

(b) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the forty-fifth day after the close of each month.

(c) *Posting.* In the event that no Collective is designated under the statutory license, or if all designated Collectives have terminated collection and distribution operations, a ~~preexisting subscription service~~Preexisting Subscription Service transmitting sound recordings under statutory license shall post and make available online its Reports of Use. ~~Preexisting subscription services~~Subscription Services shall post their Reports of Use online on or before the forty-fifth day after the close of each month, and continue to make them available thereafter to all sound recording copyright owners for a period of 90 days. ~~Preexisting subscription services~~Subscription Services may require use of passwords for access to posted Reports of Use, but must make passwords available in a timely manner and free of charge or other restrictions. ~~Preexisting subscription services~~Subscription Services may predicate provision of a password upon:

(1) Information relating to identity, location and status as a sound recording copyright owner; and

(2) A “click-wrap” agreement not to use information in the Report of Use for purposes other than royalty collection, royalty distribution, and determining compliance with statutory license requirements, without the express consent of the ~~preexisting subscription service~~Preexisting Subscription Service providing the Report of Use.

(d) *Content.* A “Report of Use of Sound Recordings under Statutory License” shall be identified as such by prominent caption or heading, and shall include ~~a preexisting subscription service~~the account number assigned to the Preexisting Subscription Service by the Collective (if the Preexisting Subscription Service has been notified of such account number by the Collective), the character encoding format used to generate the Report of Use (e.g., UTF-8), and the Preexisting Subscription Service’s “Intended Playlists” for each channel and each day of the reported month. The “Intended Playlists” shall include a consecutive listing of every recording scheduled to be transmitted, and shall contain the following information in the following order:

(1) The name of the ~~preexisting subscription service or entity~~Preexisting Subscription Service;

(2) The channel;

(3) The sound recording title;

- (4) The featured recording artist, group, or orchestra;
 - (5) The retail album title (or, in the case of compilation albums created for commercial purposes, the name of the retail album identified by the ~~preexisting subscription service~~Preexisting Subscription Service for purchase of the sound recording);
 - (6) The marketing label of the commercially available album or other product on which the sound recording is found;
 - (7) The catalog number;
 - (8) The International Standard Recording Code (ISRC) embedded in the sound recording, where available and feasible;
 - (9) Where available, the copyright owner information provided in the copyright notice on the retail album or other product (*e.g.*, following the symbol (P), that is the letter P in a circle) or, in the case of compilation albums created for commercial purposes, in the copyright notice for the individual sound recording;
 - (10) The date of transmission; and
 - (11) The time of transmission.
- (e) *Signature.* Reports of Use shall include or be accompanied by a signed statement by the appropriate officer or representative of the ~~preexisting subscription service~~Preexisting Subscription Service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the ~~preexisting subscription service~~Preexisting Subscription Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and title of the person signing the Report, and by the date of signature.
- (f) *Format.* Reports of Use should be provided on a standard machine-readable medium, such as diskette, optical disc, or magneto-optical disc, and should conform as closely as possible to the following specifications, unless the Preexisting Subscription Service and the Collective have agreed otherwise:
- (1) ~~ASCII delimited~~Delimited text format, using pipe characters as delimiter, with no headers or footers, or XML (Extensible Markup Language) format, in either case with character encoding in the UTF-8 format if feasible;
 - (2) Carats should surround strings;
 - (3) No carats should surround dates and numbers;
 - (4) Dates should be indicated by: YYYY/MM/DD;

(5) Times should be based on a 24-hour clock: HH:MM:SS;

(6) A carriage return should be at the end of each line; and

(7) All data for one record should be on a single line.

~~(g) Confidentiality.~~ Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the preexisting subscription service providing the Report of Use. **[Note: Confidentiality is addressed in § 370.5(e).]**

~~(hg)~~ *Documentation.* All compulsory licensees shall, for a period of at least three years from the date of service or posting of the Report of Use, keep and retain a copy of the Report of Use.

~~(i) In any case in which a preexisting subscription service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2010, reports of use for the corresponding calendar year filed by other preexisting subscription services shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective. [Note: Proxy distribution is addressed in § 370.6(b).]~~

§ 370.4 Reports of use of sound recordings under statutory license for nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services and business establishment services.

(a) *General.* This section prescribes rules for the maintenance and delivery of ~~reports~~ Reports of use of sound recordings under section 112(e) or section 114(d)(2) of title 17 of the United States Code, or both, by ~~nonsubscription transmission services, preexisting satellite digital audio radio services, new subscription services, and business establishment services~~ Nonsubscription Transmission Services, Preexisting Satellite Digital Audio Radio Services, New Subscription Services, and Business Establishment Services.

(b) *Definitions.* (1) *Aggregate Tuning Hours* are the total hours of programming that a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~ Preexisting Satellite Digital Audio Radio Service, a service as defined in § 383.2(h), a Business Establishment Service or a Nonsubscription Service qualifying as a Minimum Fee Broadcaster has transmitted during the reporting period identified in paragraph (d)(3) of this section to all listeners within the United States over the relevant channels or stations, and from any archived programs, that provide audio programming consisting, in whole or in part, of ~~eligible nonsubscription service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~ transmissions by means of a Preexisting Satellite Digital Audio Radio Service, a service as defined in § 383.2(h), a Business Establishment Service or a Nonsubscription Service qualifying

as a Minimum Fee Broadcaster, less the actual running time of any sound recordings for which the serviceService has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. For example, if a nonsubscription transmission serviceMinimum Fee Broadcaster transmitted one hour of programming to 10 simultaneous listeners, the nonsubscription transmission serviceMinimum Fee Broadcaster's Aggregate Tuning Hours would equal 10. If 3 minutes of that hour consisted of transmission of a directly licensed recording, the nonsubscription transmission serviceMinimum Fee Broadcaster's Aggregate Tuning Hours would equal 9 hours and 30 minutes. If one listener listened to the transmission of a nonsubscription transmission serviceMinimum Fee Broadcaster for 10 hours (and none of the recordings transmitted during that time was directly licensed), the nonsubscription transmission serviceMinimum Fee Broadcaster's Aggregate Tuning Hours would equal 10.

(2) An *AM/FM Webcast* is a transmission made by an entity that transmits an AM/FM broadcast signal over a digital communications network such as the Internet, regardless of whether the transmission is made by the broadcaster that originates the AM/FM signal or by a third party, provided that such transmission meets the applicable requirements of the statutory license set forth in 17 U.S.C. 114(d)(2).

(32) A *minimum fee broadcasterMinimum Fee Broadcaster* is a nonsubscription serviceNonsubscription Transmission Service that meets the definition of a broadcaster pursuant to § 380.2(b) of this chapter and the serviceService's payments for eligible transmissions do not exceed the annual minimum fee established for licensees relying upon the statutory licenses set forth in 17 U.S.C. 112(e) and 114.

(43) A *performancePerformance* is each instance in which any portion of a sound recording is publicly performed to a Listenerlistener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listenerlistener) but excluding the following:

(i) A performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(ii) A performance of a sound recording for which the serviceService has previously obtained a license from the Copyright Ownercopyright owner of such sound recording; and

(iii) An incidental performance that both:

(A) Makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events; and

(B) Other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(54) ~~Play frequency~~Frequency is the number of times a sound recording is publicly performed by a Service during the relevant period, without respect to the number of listeners receiving the sound recording. If a particular sound recording is transmitted to listeners on a particular channel or program only once during the reporting period, then the ~~play frequency~~Play Frequency is one. If the sound recording is transmitted 10 times during the reporting period, then the ~~play frequency~~Play Frequency is 10.

(c) *Delivery.* Reports of Use shall be delivered to Collectives that are identified in the records of the Licensing Division of the Copyright Office as having been designated by determination of the Copyright Royalty Judges. Reports of Use shall be delivered on or before the ~~forty-fifth~~thirtieth day after the close of each reporting period identified in paragraph (d)(3) of this section.

(d) *Report of Use.* (1) ~~Separate reports not required.~~ A ~~nonsubscription transmission service, preexisting satellite digital audio radio service or a new subscription service~~Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service or a New Subscription Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code and makes ephemeral phonorecords of sound recordings pursuant to the statutory license set forth in section 112(e) of title 17 of the United States Code need not maintain a separate Report of Use for each statutory license during the relevant reporting periods. However, a provider of Services subject to different statutory rates shall provide a separate Report of Use for each such type of Service. When corporate affiliates provide multiple Services of the same type, they shall if feasible consolidate their reporting onto a single Report of Use for that type of Service. Each Report of Use must cover the same scope of activity (e.g., the same Service offering and the same channels or stations) as any related statement of account, unless the Service and the Collective have agreed otherwise.

(2) *Content.* For a ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service that transmits sound recordings pursuant to the statutory license set forth in section 114(d)(2) of title 17 of the United States Code, or the statutory license set forth in section 112(e) of title 17 of the United States Code, or both, each Report of Use shall contain the following information, in the following order, for each sound recording transmitted during the reporting periods identified in paragraph (d)(3) of this section, whether or not the Service is paying statutory royalties for the particular sound recording:

(i) The name of the ~~nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service~~Nonsubscription Transmission Service, Preexisting Satellite Digital Audio Radio Service, New Subscription Service or Business Establishment Service making the transmissions, ~~including the name of the entity filing the Report of Use, if different;~~

[Note: The “category codes” provision below is proposed to be deleted only if the Judges make SoundExchange’s proposed changes concerning consolidation of ROUs, matching ROUs to SOAs, and use of account numbers.]

~~(ii) The category transmission code for the category of transmission operated by the nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service or business establishment service;~~

~~(A) For eligible nonsubscription transmissions other than broadcast simulcasts and transmissions of nonmusic programming;~~

~~(B) For eligible nonsubscription transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming;~~

~~(C) For eligible nonsubscription transmissions of non-music programming reasonably classified as news, talk, sports or business programming;~~

~~(D) [Reserved].~~

~~(E) [Reserved].~~

~~(F) [Reserved].~~

~~(G) [Reserved].~~

~~(H) For transmissions other than broadcast simulcasts and transmissions of non-music programming made by an eligible new subscription service;~~

~~(I) For transmissions of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming made by an eligible new subscription service;~~

~~(J) For transmissions of non-music programming reasonably classified as news, talk, sports or business programming made by an eligible new subscription service; and~~

~~(K) For eligible transmissions by a business establishment service making ephemeral recordings;~~

~~(iii) The featured artist, except in the case of a classical recording;~~

~~(iii) The sound recording title, except in the case of a classical recording;~~

~~(iv) The International Standard Recording Code (ISRC), where available and feasible; or, alternatively to the ISRC, the:~~

~~(A) Album The album title; and~~

(Bvi) Marketing The marketing label;

(vii) For a ~~nonsubscription transmission service~~ Nonsubscription Transmission Service except those qualifying as ~~minimum fee broadcasters~~ Minimum Fee Broadcasters and for a New Subscription Service other than a service as defined in § 383.2(h): The actual total ~~performances~~ Performances of the sound recording during the reporting period;

(viii) For a ~~preexisting satellite digital audio radio service, a new subscription service, a business establishment service or a nonsubscription service qualifying as a minimum fee broadcaster~~ Preexisting Satellite Digital Audio Radio Service, a service as defined in § 383.2(h), a Business Establishment Service or a Nonsubscription Service qualifying as a Minimum Fee Broadcaster: The actual total ~~performances~~ Performances of the sound recording during the reporting period or, alternatively, the

(A) Aggregate Tuning Hours;

(B) Channel or program name; and

(C) Play ~~frequency~~ Frequency;

(ix) In the case of a classical recording:

(A) The ensemble (e.g., orchestra or other group) identified on the commercial product packaging, if any;

(B) The conductor identified on the commercial product packaging, if any;

(C) The soloist(s) identified on the commercial product packaging, if any;

(D) The composer of the relevant musical work;

(E) The overall title of the relevant musical work (e.g., the name of a symphony); and

(F) The title of the relevant movement or other constituent part of the musical work, if applicable; and

(x) The letters “NLR” (for “no license required”) if the Service has excluded the sound recording from its calculation of statutory royalties in accordance with regulations setting forth the applicable royalty rates and terms because transmission of the sound recording does not require a license, or the letters “DL” (for “direct license”) if the Service has excluded the sound recording from its calculation of statutory royalties in accordance with regulations setting forth the applicable royalty rates and terms because the Service has a license directly from the copyright owner of such sound recording.

(3) *Reporting period.* A Report of Use shall be prepared:

(i) For each calendar month of the year by all ~~services~~Services other than a ~~nonsubscription service~~Nonsubscription Service qualifying as a ~~minimum fee broadcaster~~Minimum Fee Broadcaster; or

(ii) For a two-week period (two periods of 7 consecutive days) for each calendar quarter of the year by a ~~nonsubscription service~~Nonsubscription Service qualifying as a ~~minimum fee broadcaster~~Minimum Fee Broadcaster and the two-week period need not consist of consecutive weeks, but both weeks must be completely within the calendar quarter.

(4) *Signature*. Reports of Use shall include or be accompanied by a signed statement by the appropriate officer or representative of the ~~service~~Service attesting, under penalty of perjury, that the information contained in the Report is believed to be accurate and is maintained by the ~~service~~Service in its ordinary course of business. The signature shall be accompanied by the printed or typewritten name and the title of the person signing the Report, and by the date of the signature.

(5) *Confidentiality*. Copyright owners, their agents and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, without consent of the service providing the Report of Use. **[Note: Confidentiality is addressed in § 370.5(e).]**

(65) *Documentation*. A Service shall, for a period of at least three years from the date of service or posting of a Report of Use, keep and retain a copy of the Report of Use. During that period, a Service shall also keep and retain in machine-readable form unsummarized source records of usage underlying the Report of Use, such as server logs. If the Service uses a third-party contractor to make transmissions and it is not practicable for the Service to obtain and retain unsummarized source records of usage underlying the Report of Use, the Service shall keep and retain the original data concerning usage that is provided by the contractor to the Service.

(e) *Format and delivery*. (1) *Electronic format only*. Reports of ~~use~~Use must be maintained and delivered in electronic format only, as prescribed in paragraphs (e)(2) through (87) of this section. A hard copy ~~report~~Report of ~~use~~Use is not permissible.

(2) *ASCII text file delivery*File format: facilitation by provision of spreadsheet templates. All ~~report~~Report of ~~use~~Use data files must be delivered in ASCHtext or XML (Extensible Markup Language) format, with character encoding in the UTF-8 format if feasible. However, to facilitate such delivery, SoundExchange shall post and maintain on its Internet Web site a template for creating a ~~report~~Report of ~~use~~Use using Microsoft's Excel spreadsheet and ~~Corel's Quattro Pro spreadsheet~~ and instruction on how to convert such spreadsheets to ASCHUTF-8 text files that conform to the format specifications set forth below. Further, technical support and cost associated with the use of spreadsheets is the responsibility of the serviceService submitting the ~~report~~Report of ~~use~~Use.

(3) *Delivery mechanism*. The data contained in a ~~report~~Report of ~~use~~Use may be delivered by any mechanism agreed upon between the Service and SoundExchange, or by File Transfer Protocol (FTP), e-mail, or CD-ROM according to the following specifications:

(i) A ~~service~~Service delivering a ~~report~~Report of ~~use~~Use via FTP must obtain a username, password and delivery instructions from SoundExchange. SoundExchange shall maintain on a publicly available portion of its Web site instructions for applying for a username, password and delivery instructions. SoundExchange shall have 15 days from date of request to respond with a username, password and delivery instructions.

(ii) A ~~service~~Service delivering a ~~report~~Report of ~~use~~Use via e-mail shall append the ~~report~~Report as an attachment to the e-mail. ~~The main body of the e-mail shall identify:~~

~~(A) The full name and address of the service;~~

~~(B) The contact person's name, telephone number and e-mail address;~~

~~(C) The start and end date of the reporting period;~~

~~(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and~~

~~(E) The name of the file attached.~~

(iii) A ~~service~~Service delivering a ~~report~~Report of ~~use~~Use via CD-ROM must compress the reporting data to fit onto a single CD-ROM per reporting period. ~~Each CD-ROM shall be submitted with a cover letter identifying:~~

~~(A) The full name and address of the service;~~

~~(B) The contact person's name, telephone number and e-mail address;~~

~~(C) The start and end date of the reporting period;~~

~~(D) The number of rows in the data file. If the report of use is a file using headers, counting of the rows should begin with row 15. If the report of use is a file without headers, counting of the rows should begin with row 1; and~~

~~(E) The name of the file attached.~~

(4) *Delivery address.* Reports of ~~use~~Use shall be delivered to SoundExchange at the following address: SoundExchange, Inc., 1121 14th Street, NW., Suite 700, Washington, DC 20005; (Phone) (202) 640-5858; (Facsimile) (202) 640-5859; (E-mail) ~~reports@soundexchange.com~~physical or electronic mail address posted on its website or identified in its Notice of Designation as Collective under statutory license pursuant to § 370.5(b). SoundExchange shall forward electronic copies of these ~~reports~~Reports of ~~use~~Use to ~~all~~any other ~~collectives~~Collectives defined in this section.

(5) *File naming.* Each data file contained in a ~~report~~Report of ~~use~~Use must be given a name by the ~~service~~Service, consisting of the most specific service name appropriate to the scope of usage reflected in the Report of Use and statement of account, followed by the start and end date of the reporting period. The start and end date must be separated by a dash and in the format of year, month, and day (YYYYMMDD). Each file name must end with the file type extension of “.txt”. (Example: AcmeMusicCo20050101–20050331.txt).

(6) *File type and compression.* (i) All data files must be in ASCII format~~text~~ or XML (Extensible Markup Language) format, with character encoding in the UTF-8 format if feasible.

(ii) A ~~report~~Report of ~~use~~Use must be compressed in one of the following zipped formats:

(A) .zip—generated using utilities such as WinZip and/or UNIX zip command;

(B) .Z—generated using UNIX compress command; or

(C) .gz—generated using UNIX gzip command.

(iii) Zipped files shall be named in the same fashion as described in paragraph (e)(5) of this section, except that such zipped files shall use the applicable file extension compression name described in this paragraph (e)(6).

(7) *Files with headers.* (i) ~~If a service elects to~~Services shall submit files with headers, in which the following elements, in order, must occupy the first ~~14~~17 rows of a ~~report~~Report of ~~use~~Use:

(A) Name of ~~service~~Service as it appears on the relevant statement of account, which shall be the most specific service name appropriate to the scope of usage reflected in the Report of Use and statement of account;

(B) The account number assigned to the Service by the Collective for the relevant Service offering (if the Service has been notified of such account number by the Collective);

(~~B~~C) Name of contact person;

(D) Street address of the serviceService;

(~~D~~E) City, state and zip code of the ~~service~~Service;

(~~E~~F) Telephone number of the contact person;

(~~F~~G) E-mail address of the contact person;

(~~G~~H) Start of the reporting period (YYYYMMDD);

(~~H~~I) End of the reporting period (YYYYMMDD);

(I) Report generation date (YYYYMMDD);

(J) Station call letters, if multiple broadcast stations are included in the Report of Use, or otherwise a blank line;

(K) Number of rows in data file, beginning with 1518th row;

(K) Text indicator character;

(L) Field delimiter character;Checksum (the total of the audience measurements reported on the Report of Use);

(M) Audience measurement type (ATP if the Service reports actual total Performances, ATH if the Service reports Aggregate Tuning Hours);

(N) Character encoding format used to generate the Report of Use (e.g., UTF-8);

(O) Digital signature pursuant to paragraph (d)(4) of this section, if included in the Report of Use;

(P) Blank line; and

(N) Report headers (Featured Artist, Sound Recording Title, etc.).

(ii) Each of the rows described in paragraphs (e)(7)(i)(A) through (FG) of this section must not exceed 255 alphanumeric characters. Each of the rows described in paragraphs (e)(7)(i)(GH) through (I) of this section should not exceed eight alphanumeric characters.

(iii) Data text fields, as required by paragraph (d)(2) of this section, begin on row 1518 of a ~~report~~Report of ~~use~~Use ~~with headers~~. A carriage return must be at the end of each row thereafter. Abbreviations within data fields are not permitted.

(iv) The text indicator character must be unique and must never be found in the ~~report~~Report's data content.

(v) The field delimiter character must be unique and must never be found in the ~~report~~Report's data content. Delimiters must be used even when certain elements are not being reported; in such case, the ~~service~~Service must denote the blank data field with a delimiter in the order in which it would have appeared.

~~(8) Files without headers. If a service elects to submit files without headers, the following format requirements must be met:~~

~~(i) ASCII delimited format, using pipe (|) characters as delimiters, with no headers or footers;~~

~~(ii) Carats (^) should surround strings;~~

~~(iii) No carats (A) should surround dates and numbers;~~

~~(iv) A carriage return must be at the end of each line;~~

~~(v) All data for one record must be on a single line; and~~

~~(vi) Abbreviations within data fields are not permitted.~~

~~(f) In any case in which a nonsubscription transmission service, preexisting satellite digital audio radio service, new subscription service, or business establishment service has not provided a report of use required under this section for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, prior to January 1, 2010, reports of use for the corresponding calendar year filed by other services of the same type shall serve as the reports of use for the non-reporting service, solely for purposes of distribution of any corresponding royalties by the Collective. [Note: Proxy distribution is addressed in § 370.6(b).]~~

§ 370.5 Designated collection and distribution organizations for reports of use of sound recordings under statutory license.

(a) *General.* This section prescribes rules under which ~~reports~~Reports of ~~use~~Use shall be collected and ~~distributed~~made available under section 112(e) and 114(f) of title 17 of the United States Code, ~~and under which reports of such use shall be kept and made available.~~

(b) *Notice of Designation as Collective under Statutory License.* A Collective shall file with the Licensing Division of the Copyright Office and post and make available online a “Notice of Designation as Collective under Statutory License,” which shall be identified as such by prominent caption or heading, and shall contain the following information:

(1) The Collective name, address, telephone number and facsimile number;

(2) A statement that the Collective has been designated for collection and distribution of performance royalties under statutory license for digital transmission of sound recordings; and

(3) Information on how to gain access to the online Web site or home page of the Collective, where information may be posted under this part concerning the use of sound recordings under statutory license. The address of the Licensing Division is: Library of Congress, Copyright Office, Licensing Division, 101 Independence Avenue, SE., Washington, DC 20557–6400.

(c) *Annual Report.* The Collective will post and make available online, for the duration of one year, an Annual Report on how the Collective operates, how royalties are collected and distributed, and what the Collective spent that fiscal year on administrative expenses. The Collective should post its Annual Report by no later than September 30 of the year following the year that is the subject of the report.

(d) *Inspection of Reports of Use by copyright owners and featured artists.* The Collective shall make copies of the Reports of Use for the preceding three years available for inspection by any sound recording copyright owner or featured artist, without charge, during normal office hours upon reasonable notice. The Collective shall predicate inspection of Reports of Use upon information relating to identity, location and status as a sound recording copyright owner or featured artist, and the copyright owner's or featured artist's written agreement not to utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use. ~~The Collective shall render its best efforts to locate copyright owners in order to make available reports of use, and such efforts shall include searches in Copyright Office public records and published directories of sound recording copyright owners.~~

(e) *Confidentiality.* Copyright owners, their agents, and Collectives shall not disseminate information in the Reports of Use to any persons not entitled to it, nor utilize the information for purposes other than royalty collection and distribution, and determining compliance with statutory license requirements, without express consent of the Service providing the Report of Use.

(f) *Termination and dissolution.* If a Collective terminates its collection and distribution operations prior to the close of its term of designation, the Collective shall notify the Licensing Division of the Copyright Office, the Copyright Royalty Board and all Services transmitting sound recordings under statutory license, by certified or registered mail. The dissolving Collective shall provide each such Service with information identifying the copyright owners it has served.

(g) Authority to agree to special reporting arrangements. A Collective is authorized to agree with Services concerning reporting requirements to apply in lieu of the requirements set forth in this part.

§ 370.6 Late reports of use.

(a) Late fee. A Service shall pay a late fee for each instance in which any Report of Use is not received by the Collective in compliance with the regulations in this part by the due date. Such late fee shall be a monthly percentage of the payment associated with the late Report of Use, where such percentage is the percentage rate specified for late payments in the applicable regulations setting forth royalty rates and terms for Services of that type. The late fee shall accrue from the due date of the Report of Use until a fully compliant Report of Use is received by the Collective or the relevant royalties are distributed pursuant to paragraph (b) of this section, provided that, in the case of a timely provided but noncompliant Report of Use, the Collective has notified the Service within 90 days regarding any noncompliance that is reasonably evident to the Collective.

(b) Proxy distribution. In any case in which a Service has not provided a compliant Report of Use required under this part for use of sound recordings under section 112(e) or section 114 of title 17 of the United States Code, or both, and the board of directors of the Collective determines that further efforts to seek missing Reports of Use from the Service would not be

warranted, the Collective may determine that it will distribute the royalties associated with the Service's missing Reports of Use on the basis of a proxy data set approved by the board of directors of the Collective.

§ 370.7 Correction of reports of use and statements of account.

If a Service discovers that it has submitted a Report of Use or statement of account for a particular reporting period that is in error, the Service should promptly deliver to the Collective a corrected Report of Use or statement of account, as applicable. However, more than 90 days after the Service's first submission of a Report of Use or statement of account for a particular reporting period, as the case may be, the Service cannot claim credit for a reduction in royalties by submitting a corrected Report of Use or statement of account for the reporting period. Subject to the foregoing, when a Service submits a corrected Report of Use or statement of account for a prior reporting period, the Collective may allocate any upward or permitted downward adjustment in the Service's royalty obligations to the usage reported on the Service's next Report of Use provided in the ordinary course.

Exhibit C
SoundExchange Royalty Accounting Process

To help the Judges understand how SoundExchange uses the data provided pursuant to the notice and recordkeeping regulations to carry out the mission the Judges have assigned to SoundExchange, we provide a brief, high-level sketch of SoundExchange's royalty collection and distribution process below.

A service that wishes to rely on the statutory licenses must file a Notice of Use in the Licensing Division of the Copyright Office pursuant to 37 C.F.R. § 370.2. SoundExchange obtains Notices of Use filed in the Copyright Office and uses the information contained therein to set up in SoundExchange's licensee database records of licensees and services from which it might expect payment.

SoundExchange's License Management department receives royalty payments and, when the system works properly, two kinds of reports: SOAs and ROUs. SOAs and ROUs generally are provided separately, and while payments are required to be accompanied by a SOA (*e.g.*, 37 C.F.R. § 380.4(f)), it is common for the check and SOA to be sent separately. On average, SoundExchange receives about 1,100 SOAs, about 600 payments and about 1,000 ROUs per month. (Fewer payments than SOAs or ROUs are received because many services do not exhaust the usage covered by their annual minimum fee payment until later in the year, even though SOAs and ROUs are required every month, in the case of commercial services.)

When SoundExchange receives payment from a licensee, that payment is logged into SoundExchange's licensee database. If the licensee operates services in multiple rate categories, the royalty payments are allocated among the applicable rate categories based on the SOAs provided. Similarly, aggregated payments by a parent company covering corporate subsidiaries

(e.g. by a radio station group covering individual radio stations) are allocated among the subsidiaries if the parent provides sufficient information to do so.

Payments and SOAs are then matched to ROUs in order to determine which artists and copyright owners should be paid. ROUs can be massive. The largest ROUs SoundExchange receives have on the order of a million consolidated performance lines.²⁰ SoundExchange receives ROUs by FTP (electronic transfer in the File Transfer Protocol format), as an email attachment, and occasionally on compact disc. When everything works as it should, ROUs are associated with a service's payments and SOAs for a particular period and loaded into SoundExchange's royalty distribution system. However, ROUs frequently are improperly formatted or contain substantial missing or inaccurate information. In such situations SoundExchange staff must review the reports, and depending on the situation, may work with the service to obtain a corrected report, or may attempt to load the report with manual intervention to extract whatever useful information can be had.

Once an ROU is loaded into SoundExchange's royalty distribution system, SoundExchange's systems seek to match the recordings reported with information in SoundExchange's database concerning known recordings and their copyright owners and performers. When reported recordings can be matched to known repertoire, SoundExchange assigns the reported performances to accounts belonging to copyright owners and performers. However, a reported recording might not match a known recording if, for example, the service has performed a recording by an unsigned artist, or a new, old, foreign or other obscure recording that has not previously been reported to SoundExchange, or if the service has provided incomplete, incorrect or ambiguous identifying information. In such cases, SoundExchange

²⁰ The raw ROUs may be much larger than the consolidated ROUs.

personnel research the reported recordings to determine whether they should be added to SoundExchange's database or are currently in the database under different identifying information. When identification is made, the relevant performances are processed through the steps that follow.

To assign payments to usage, SoundExchange allocates a service's royalty payments for a given period to sound recordings used by the service during that period. SoundExchange also deducts its costs pursuant to Section 114(g)(3) (sometimes referred to as SoundExchange's "administrative fee").

Next, the process of distributing allocated royalties begins with consolidating allocations across licensees' ROUs within a license category according to earning entity.²¹ The consolidated accruals are then assigned to separate accounts for some 24,000 copyright owners and 70,000 artists or other payees based on the payment instructions for each. Next, the system generates a payment file, which SoundExchange transmits to its banking partner. SoundExchange generally provides each royalty-earning entity with an electronic or hard copy statement reflecting the performances – and the licenses under which the sound recordings were performed – for which the royalty payment is made. When there is a payable balance in a payee's account above the applicable distribution threshold, a check is mailed or funds are electronically transferred.

Payments for which SoundExchange lacks sufficient information to distribute to the appropriate copyright owner or performer are allocated to separate accounts in accordance with applicable unclaimed funds regulations (*e.g.*, 37 C.F.R. § 380.8). When SoundExchange

²¹ An "earning entity" is the person or entity that earned the royalties from a tax standpoint and does not have to be the person who receives royalties.

subsequently obtains the information necessary to distribute royalties to a particular copyright owner or performer, it will do so in a future distribution.